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decision of the suit they could not apply for payment of the amount to them either by the Court or by the appellants. This distinguishes the present case from the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1). Upon the *ex parte* decree being set aside the parties were relegated to the position in which they were before the decree was made. Therefore the injunction which had been issued to the respondents under section 492 revived and remained in full force, and the respondents could not have asked for payment of the money. As we have said above, it was only when the suit was finally decided and the decree was made for a smaller sum than that which the appellants had taken from the Court that the respondents' right to a refund accrued. As their application for a refund was made within three years of that date, the application is not time-barred. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Karamat Husain.

1908 *June* 20.

UMAN KUNWARI (DEFENDANT) *v.* JARBANDHAN (PLAINTIFF) AND RAM RAJI KUNWARI (DEFENDANT).*

Civil Procedure Code, sections 562, 588 (28)—*Remand—Appeal from order of remand filed after decision of suit in accordance therewith.*

Held that the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. *Babu Lal* v. *Ram Kali* (2) followed. *Salig Ram* v. *Brij Bilas* (3) overruled. *Rameshur Singh* v. *Sheo Din Singh* (4), *Sheo Nath Singh* v. *Ram Din Singh* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6) referred to. *Madhu Sudan Sen* v. *Kamini Kanta Sen* (7) dissented from.

THIS was an appeal in a pre-emption suit. The court of first instance (Munsif of Basti) dismissed the suit on the 30th of April 1906, but the lower appellate court (officiating Subordinate Judge of Gorakhpur) reversed this decision, and, on the 27th

* First Appeal No. 69 of 1907, from an order of Banke Bihari Lal, Subordinate Judge of Gorakhpur, dated the 27th of March 1907.

(1) (1900) I. L. R., 28 Calc., 113.
(2) Weekly Notes, 1906, p. 28.
(3) (1907) I. L. R., 29 All., 659.
(4) (1889) I. L. R., 12 All., 510.
(5) (1895) I. L. R., 18 All., 19.
(6) (1885) I. L. R., 12 Calc., 45.
(7) (1905) I. L. R., 32 Calc., 1023.

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of March 1907, remanded the case to the first court under section 562 of the Code of Civil Procedure. From this order the present appeal was preferred by the defendant vendee on the 29th of June 1907. Meanwhile, however, the court of first instance had carried out the order of remand and had decreed the plaintiff's claim on the 20th of May 1907. When the appeal came on for hearing a preliminary objection was raised to the effect that the order of remand having been carried out before the appeal was filed, the appeal could not be entertained. In view of a conflict of authority on the point thus raised the appeal was referred to a Full Bench.

Dr. *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*), in support of the preliminary objection argued that two remedies were open to the appellant; either she could file an appeal from the order of remand, or she could impeach it under section 591 of the Code of Civil Procedure in an appeal from the final decree in the suit. The uniform practice of the Court at one time was not to entertain appeals similar to the present. On this question of practice *Prag Lal* v. *Raghubar Das* (1), *Ikram-un-nissa* v. *Muhammad Wazir* (2), *Karori Mal* v. *Sahodra* (3), *Salig Ram* v. *Brij Bilas* (4), and *Gulzari Mal* v. *Karim-un-nissa* (5) were referred to.

The principle which should be applied is that where the final decree in the cause has been made no separate appeal should be entertained against a prior interlocutory order, *Madhu Sudan Sen* v. *Kamini Kanta Sen* (6). The decision in *Sheo Nath Singh* v. *Ram Din Singh* (7) also supports this contention. If there is no ground for appeal against the final decree on the merits, the interlocutory order of remand cannot be impugned. This shows that a bad order of remand is not necessarily *ultra vires*; if it were, then all subsequent proceedings would be *ultra vires* and the final decree could be challenged as made without jurisdiction. In *Rameshur Singh* v. *Sheo Din Singh* (8) the order of remand was, in view of the provisions of section 564 of the Code of Civil Procedure, held to have been

(1) Weekly Notes, 1881, p. 174.
(2) Weekly Notes, 1882, p. 53.
(3) Weekly Notes, 1884, p. 5.
(4) I. L. R., 29 All., 659.
(5) Weekly Notes, 1908, p. 76.
(6) (1905) I. L. R., 32 Calc., 1023.
(7) (1895) I. L. R., 18 All., 19.
(8) (1889) I. L. R., 12 All., 510.

made without jurisdiction. But here no question of jurisdiction arises. The Court had jurisdiction to decide whether the wa-jib-ul-arz applied, and if it did take an erroneous view of the law or of the facts, the order made could in no sense be termed *ultera vires—Malkarjun* v. *Narhari* (1). There was no inherent absence of jurisdiction in the lower court to deal with the appeal before it, and section 578 of the Code would cover the case. *Ledgard* v. *Bull* (2) and *Mohesh Chandra Das* v. *Jamir-ud-din Mollah* (3) were referred to.

Babu *Surendra Nath Sen*, for Babu *Durga Charan Banerji*, for the appellant.

The Code of Civil Procedure gives two remedies, no doubt, but these are neither co-extensive nor alternative. The right of appeal given by section 591 of the Code is weak and doubtful; the question cannot be raised in first appeal to the lower court, and it cannot be raised even in second appeal where the final decree, by reason of findings of fact or otherwise, cannot be challenged on the merits. Section 588 of the Code is not controlled by section 586.

Thus the decree in a Small Cause Court is not open to appeal, but an order of remand is. See *Collector of Bijnor* v. *Jafar Ali Khan* (4). The new Code contains an express provision (see section 105, clause 2) which to some extent purports to modify the existing law. But neither in the new Code nor in the old is there anything to show that the intention of the Legislature is that where an order of remand has been carried out the party aggrieved cannot file an appeal against that order. Upon the question of jurisdiction reference was made to *Dhan Singh* v. *Basant Singh* (5). In *Salig Ram* v. *Brij Bilas* (6) it was assumed that the decree passed after a remand cannot be touched even though the order of remand be set aside. But, if the order of remand is a bad order, it is submitted that all proceedings in the suit, including the decree, subsequent to such order will necessarily be void.

The following cases were referred to:—

(1) (1900) I. L. R., 25 Bom., 337.
(2) (1886) I. L. R., 9 All., 191.
(3) (1900) I. L. R., 28 Calc., 324.
(4) (1880) I. L. R., 3 All., 18.
(5) (1886) I. L. R., 8 All., 519.
(6) (1907) I. L. R., 29 All., 659.

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Jarbandhan Singh v. *Nakchhed Singh* (1), *Cheda Lal* v. *Badullah* (2), *Rameshur Singh* v. *Sheo Din Singh* (3), *Mahgu Kuar* v. *Faujdar Kuar* (4), *Babu Lal* v. *Ram Kali* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6).

Dr. *Satish Chandra Banerji* replied.

BANERJI, AIKMAN and KARAMAT HUSAIN, JJ.—This is an appeal from an order of remand made under section 562 of the Code of Civil Procedure in a suit for pre-emption.

The Court of first instance dismissed the suit on the 30th of April 1906, but the lower appellate Court set aside the decree of that Court and remanded the case on the 27th of March 1907. From this order the present appeal was preferred on the 29th of June 1907. Before, however, the appeal was filed, the Court of first instance had carried out the order of remand and decreed the claim on the 20th of May 1907. Hence it is contended on behalf of the respondents that the appeal cannot be entertained. As the rulings on the point are conflicting, the case has been referred to a Full Bench.

The first question we have to determine is whether an appeal lies from an order of remand passed under section 562 of the Code of Civil Procedure, if before the filing of the appeal the suit has been decided in compliance with the order of remand. In our judgment the question must be answered in the affirmative. A party aggrieved by an order of remand has, under section 588, clause (28), of the Code of Civil Procedure, a right of appeal from the order, and the period of limitation for such an appeal is ninety days under art. 156 of the second schedule to the Indian Limitation Act. Unless, therefore, the law has imposed a restriction on this right, an appeal is maintainable if it is filed within the prescribed period of limitation. We are not aware of any such restriction, and none has been brought to our notice. The learned advocate for the respondent contends that where a party has two alternative remedies and he avails himself of one of them he cannot resort to the other, and that as the appellant has allowed the remand order to be carried out his remedy is an appeal from the ultimate decree in the case, in which he can question the

(1) Weekly Notes, 1887, p. 224.
(2) (1888) I. L. R., 11 All., 35.
(3) (1889) I. L. R., 12 All., 510.
(4) Weekly Notes, 1891, p. 105.
(5) Weekly Notes, 1891, p. 187.
(6) Weekly Notes, 1906, p. 28.

validity of the order of remand. This argument is in our judgment fallacious. If after the order of remand the case is tried by the Court of first instance, it is so tried not at the instance of the party who is prejudiced by the order of remand, but in compliance with that order. It is not in the power of that party to prevent a trial, and it cannot be said that in allowing the case to be tried he resorts to an alternative remedy in respect of the order of remand. It is true that, if he can appeal to the High Court from the final decree made in the case by the lower appellate Court, he may, as held by the Full Bench in *Rameshur Singh* v. *Sheo Din Singh* (1) question the legality and correctness of the order of remand, but in such an appeal the propriety of the order of remand cannot be made the sole ground of appeal. This was so held in *Sheo Nath Singh* v. *Ram Din Singh* (2). Unless, therefore, he has a substantive ground of appeal to the High Court, he would have no remedy against the order of remand. The doctrine of election of remedies seems to us to have no application.

It is next urged that, even if the present appeal from the order of remand be entertained, the decision in the appeal will be of no avail to the appellant as the decree passed by the Court of first instance in compliance with the order of remand would still remain a valid decree. This appears to be the foundation of the decision of a Bench of this Court in *Salig Ram* v. *Brij Bilas* (3). With great deference, we are unable to agree with the learned Judges who decided that case. After the Court of first instance had once decided the case, it ceased to have any jurisdiction to hear it again except on review of judgment. Its jurisdiction to hear it a second time was derived solely from the order of remand. If that order was erroneous and is set aside, everything done in pursuance of the order must fall to the ground and be of no effect. We are in full accord with the following observations of Field, J., in *Jatinga Valley Tea Co., Ld.*, v. *Chera Tea Co., Ld.*, (4), which were approved of by Edge, C. J., in *Rameshur Singh* v. *Sheo Din Singh* (5). Field, J., said :— "It has been contended before us that the appeal ought not be heard. It is said that after the remand order the Munsif

(1) (1889) I. L. R., 12 All., 510.
(2) (1895) I. L. R., 18 All., 19.
(3) (1907) I. L. R., 29 All., 659.
(4) (1885) I. L. R., 12 Calc., 45.
(5) (1889) I. L. R., 12 All., 510.

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proceeded to make a final decree and the existence of that final decree is a bar to the hearing of the appeal against the order of remand. We are unable to concur in this contention. The law, sub-section (28) of section 588 of the Code of Civil Procedure, expressly gives an appeal against an order under section 562 remanding a case. That provision is not in any way qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance before that appeal is preferred or comes on for hearing. We cannot therefore import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree, and indeed all the proceedings taken under the remand order are *null* and *void*." In his judgment in *Rameshur Singh* v. *Sheo Din Singh*, Edge, C.J., after quoting the above passage, said :—" I agree with every word in the passage which I have just quoted." The other learned Judges apparently agreed with him. Mahmood, J., referring to a practice prevailing in this Court under which the Court declined to try an appeal from an order of remand under section 562 on the ground that the remand order had in the meantime been carried out, observed :—" I think I must say, after what the learned Chief Justice has said in his judgment in this case, that such a practice was erroneous." The learned Judge apparently referred to the rulings reported in the Weekly Notes, 1881, p. 211, Weekly Notes, 1882, p. 53, and Weekly Notes, 1884, p. 5, to which the learned advocate for the respondents has invited our attention. It appears to us that in the opinion of the learned judges who decided the Full Bench case of *Rameshur Singh* v. *Sheo Din* the fact of a remand order having been carried into effect before the filing of an appeal from that order or before the decision of an appeal preferred from that order would not preclude the Court from entertaining the appeal. The case of *Jatinga Valley Tea Co., Ld.*, v. *Chera Tea Co., Ld.*, referred to above was distinguished in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1) on the ground that the appeal in that case had been filed before the remand order was carried into effect. We fail, however, to see how the

(1) (1905) I. L. R., 32 Calc., 1023.

fact of the remand order having been complied with can make any difference in principle upon the question before us. In the case last mentioned the learned Chief Justice, Sir Francis Maclean, said :—"If a party desire to avail himself of the privilege conferred by section 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit." As we have pointed out above, section 588, clause (28), gives a right of appeal from an order of remand to be exercised within the period of limitation prescribed for such an appeal. To impose any other limitation or restriction on the right of appeal would be, to use the words of Field, J., "to import into the Code a provision which does not there exist." It often happens that an order of remand is carried out before the expiry of the period of limitation for the filing of an appeal. If the restriction contended for be imposed on the right of appeal, the party affected by the remand order may in many cases be without a remedy. He may not have any ground for appealing against the final decree, and he cannot, according to the rulings of this Court, appeal only on the ground that the remand order was erroneous. In our judgment the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal, and we agree with the ruling in *Babu Lal* v. *Ram Kali* (1).

Turning now to the merits of the case, we are of opinion that this appeal must prevail. The plaintiff's claim for pre-emption is based on custom as recorded in the wajib-ul-arz. According to that document, as we read it, the custom mentioned in it prevails among members of the co-parcenary body. The property sold is what is called *arazidari* land. It does not clearly appear what the nature of *arazidari* lands is. But, after referring to various settlement reports, we find that *arazidars* are not members of the co-parcenary body. The rule of pre-emption which applies to co-parceners is not therefore applicable to them and the plaintiff's claim must fail.

(1) Weekly Notes., 1906, p., 28

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We accordingly allow the appeal, set aside the order of the Court below, and restore the decree of the Court of first instance. The appellant will have his costs here and in the Court below.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Griffin.

C. E GREY, OFFICIAL ASSIGNEE, (APPLICANT) *v.* HAZARI LAL (DECREE-HOLDER).*

1908 *July* 14.

Civil Procedure Code, section 244—Official Assignee—Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment debtor paid to him—Appeal.

Held that, the Official Assignee not being the representative of an insolvent judgment-debtor, no appeal would lie against the disallowance of his claim to have the proceeds of a sale in execution of a decree against an insolvent judgment-debtor paid over to him. *Kashi Prasad* v. *Miller* (1), *Sardarmal* v. *Aranvayal Sabhapathy* (2) and *Chandmull* v. *Ranee Soondery Dossee* (3) referred to.

THE facts out of which this appeal arose were as follows:—

One Hazari Lal obtained a decree against Dhani Ram and his son, Lachmi Narain on the 2nd of May 1907. In execution of this decree, property belonging to the judgment-debtors was sold on the 27th and 28th May 1907. The judgment-debtors were declared insolvent by the Calcutta High Court and vesting orders in respect of their property were passed in the case of Dhani Ram on the 17th May 1907 and in the case of Lachmi Narain on the 29th May 1907. The insolvents' schedules were not filed until the 7th April 1908. The appellant, who is the Official Assignee, applied to the Court below for payment to him of the proceeds of the sale. The Court below (Subordinate Judge of Cawnpore) relying on the ruling in the case of *Kashi Prasad* v. *Miller* (4) refused the application.

The Official Assignee thereupon appealed to the High Court.

* First Appeal No. 257 of 1907, from a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 5th of August 1907.

(1) (1885) I. L. R., 7 All., 752.
(2) (1896) I. L. R., 21 Bom., 205.
(3) (1894) I. L. R., 22 Calc., 259.
(4) (1885) I. L. R., 7 All., 752.